United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7479

To be argued by
ROBERT M. CALLAGY

United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

A. E. HOTCHNER,
Plaintiff-Appellee,

—against—

JOSE LUIS CASTILLO-PUCHE,
Defendant,

—and—

DOUBLEDAY & COMPANY, INC.,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

SATTERLEE & STEPHENS
Attorneys for Defendant-Appellant
277 Park Avenue
New York, New York 10017
Tel. (212) 826-6200

JAMES F. DWYER
ROBERT M. CALLAGY
JAMES F. RITTINGER
Of Counsel

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BRIEF FOR DEFENDANT-APPELLANT

Issues Presented on Appeal

1. Whether as a matter of law plaintiff-appellee ("Hotchner") proved by clear and convincing evidence that defendant-appellant ("Doubleday") published certain statements about Hotchner with "actual malice"—that is with knowledge that they were false or with reckless disregard of whether they were false or not.

2. Whether, in any event, publication of said statements was actionable: five were clearly statements of the author's opinion and the proof with respect to the sixth was insufficient to prove recklessness on Doubleday's part.

3. Whether the court erred as a matter of law in not dismissing the invasion of privacy count.

4. Whether the court below committed various and numerous prejudicial errors during the course of the trial.

5. Whether the court erred in submitting the question of punitive damages to the jury inasmuch as there was insufficient evidence to permit an award of punitive damages under either federal constitutional standards or New York substantive law.

6. Whether the court below erred in not setting aside the punitive damage award by reason of the fact that it was excessive.

Statement of the Case

Doubleday appeals from a judgment (186a)* entered on September 1, 1976 following a trial in the United States District Court for the Southern District of New York (Brieant, J.) in which a jury returned a verdict on April 30, 1976 (151a) in favor of Hotchner for $1.00 in compensatory damages on each of the two counts (libel and invasion of privacy) and $125,000 in punitive damages on each count but not both. Further, Doubleday appeals from each of the following orders of the district court (Brieant, J.): the denial of Doubleday's motion for summary judgment (98a and officially reported at 404 F. Supp. 1041 (1975)); the denial of Doubleday's motion to dismiss the invasion of privacy count (28a); the denial of Doubleday's motion to exclude a prejudicial translation of a portion of the original Spanish work prepared by Hotchner exclusively for this action (150a); the denial of Doubleday's post-trial motions for judgment n.o.v. or for a new trial and to vacate

* "a" references are to the Appendix; "t" references are to pages from the Trial Record.

or reduce the award of punitive damages (176a); and various prejudicial rulings made during the course of the trial.

Background and Facts

The subject of this action is certain statements, identified below, which appear in *Hemingway in Spain* (the "Book") (Exhibit 1, 6a) an English translation of a work originally published in the Spanish language in Spain in 1967 entitled *Hemingway: entre la vida y la muerte* (the "Spanish work"). (Exhibit 26, 7a) The Spanish work was written by the noted Spanish journalist and author Jose Luis Castillo-Puche ("Castillo-Puche")* and published by the important Spanish publisher Ediciones Destino ("Destino"). The Book is a personal reminiscence by Castillo-Puche about the time he spent in Spain and Cuba with Hemingway and about what Hemingway and Spain meant to each other. There are seventeen references in the 388 page Book to Hotchner, who was a traveling companion of Hemingway's in Spain. Hotchner's complaint (12a) objected to these references and to two others that did not refer to him. The jury found that Hotchner had been defamed by only six, namely: statements that Hotchner was: (1) a "toady", (152a), (2) a "hypocrite", (154a), (3) "an exploiter of Hemingway", (156a), (4) that Hemingway said of him "He's a little precious, but he's a very smart cookie" . . . "I don't really trust him though", (157a), (5) that because Hotchner had earned lots of money for Hemingway he "had been motivated by something other than worshipful admiration for a great writer", (164a) and (6) that Hotchner was a "ridiculous" figure who "hung around" Hemingway and exploited the latter's reputation even

* Castillo-Puche was named as a party defendant but did not appear to defend the action. Following the trial a motion was made by attorneys for the Spanish Consul, appearing specially on Castillo-Puche's behalf, and the complaint against him was dismissed for lack of personal jurisdiction. (184a-185a)

though he [Hotchner] "may have seriously thought he was looking after [Hemingway's] interests and protecting him" (166a).

Doubleday acquired the English language rights to the Spanish work pursuant to an agreement with Destino dated May 18, 1970 (201a). It hired Helen Lane, an award-winning translator, to translate (249a) the Spanish work into English and published her translation in the United States in 1974 (Exhibit 1, 6a). Only 7,500 copies were printed, of which less than half (3,488 copies) have been sold (195a). Doubleday lost money on the Book.

Hotchner, a well-known writer and lecturer, was held by the district court to be a public figure for purposes of litigation concerning his relationship with Ernest Hemingway (110a). In fact, it was Hotchner's own story of his relationship with Hemingway, *Papa Hemingway*, which first earned him a national reputation. *Papa Hemingway*, in hard and soft cover, sold more than 630,000 copies and was published in 18 countries abroad. From sales of this book alone, Hotchner earned more than $400,000 (191a). In addition, he earned another $400,000 by adapting various Hemingway works for television and the movies (192-193a).

The Trial

It was clear beyond peradventure, as Hotchner's counsel and the trial judge recognized, that Hotchner had failed to prove that Doubleday published the statements referring to him with actual knowledge that they were false. (342a) Consequently, Hotchner's case depended upon proof that Doubleday had published the statements with reckless disregard of whether they were false or not. His principal evidence in this regard consisted of an inter-office memorandum (Exhibit 9, 214a) from Doubleday's files in which the assistant contracts manager recommended to the editor in charge of the book that certain statements be deleted,

modified or toned down. This recommendation was adopted by the editor who revised the offensive material (Exhibit 5A-5G, 203a-210a) and in the course thereof obtained the approval of the Spanish author to the same (Exhibit 12, 219a), the author stating that while he consented to any revision which Doubleday thought necessary to avoid litigation, he nonetheless reaffirmed the truth of the statements made about Hotchner. Hotchner testified, of course, that none of the statements made about him was true and the sum of the testimony of his other witnesses was simply that, although they had no knowledge of the particular circumstances to which the statements referred, it was the opinion of each that, based upon what each knew about the relationship between Hotchner and Hemingway, the author's statements were not accurate. There was other testimony from these witnesses concerning certain innocuous non-defamatory statements unrelated to Hotchner which were claimed to be inaccurate, but there was no testimony that Doubleday either knew or was aware that they were.

Doubleday called witnesses to prove that (i) it had no knowledge of the alleged falsity of the statements and that it acted reasonably in revising statements about Hotchner, (ii) that the translator of the work was highly regarded, (iii) that persons closest to Hemingway, his wife and his secretary, believed that the author's stated opinions about Hotchner were reasonable and that the statements attributed to Hemingway about Hotchner would not have been out of character for Hemingway to have made, and, finally, (iv) Castillo-Puche, the author, was one of Spain's foremost writers who had been the recipient of prizes for his writing and journalism (590t), and that the Spanish publisher Destino was a reputable and prominent publishing house in Madrid (600t). Doubleday submits that the trial record establishes not only that there was a failure to prove that it had published recklessly, not caring whether the statements were true or false, but, moreover, that the testi-

mony of the Doubleday witnesses showed that Doubleday had acted reasonably in the circumstances and entertained no serious doubt as to the truth of the statements made about Hotchner.

Preliminary Statement

Because Hotchner is a public figure he may not recover for injury to reputation except on clear and convincing proof that defamatory falsehoods were published with reckless disregard for the truth. As this Court recognized in *Buckley* v. *Littell*, 539 F.2d 882 (2nd Cir. 1976):

> "As to our role in reviewing a libel case, the First Amendment requires careful appellate review of the facts found at trial which have constitutional significance. As the Court said in *New York Times Co.* v. *Sullivan, supra*:
>
> > '[T]he rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect". [Citations omitted.] We must "make an independent examination of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.' 376 U.S. at 285. [Citation omitted.]
>
> . . . It may be true that, as a general rule, we are permitted only to review findings of fact under the 'clearly erroneous' standard when the factfinder is a judge. (C. Wright & A. Miller, Federal Practice and Procedure §2585, at 730-31, 734 (1971)). But when interpretation of a communication in the light of the constitutional requirements is involved, our scope of review is to examine in depth the 'statements in issue' and the 'circumstances in which they are made.' See, *New York*

Times Co. v. *Sullivan, supra,* 376 U.S. at 285 n. 26; [Citations omitted]. It is our duty to 're-examine the evidentiary basis' of the lower court decision, *Time, Inc.* v. *Pape, supra,* 401 U.S. at 284, [Citation omitted] in the light of the Constitution." (*Id.* at 888).

We now turn to an exposition of the facts and the law which in our opinion clearly manifest the errors of the results below.

ARGUMENT

POINT I

As a Matter of Law Hotchner Failed to Prove by Clear and Convincing Evidence That Doubleday Published the Allegedly Libelous Statements With Knowledge of Falsity or with Reckless Disregard of Their Truth or Falsity

In *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Supreme Court imposed limitations on state libel laws and held that the freedoms of speech and press guaranteed by the First and Fourteenth Amendments prohibit "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

The *New York Times* standard was extended to actions by public figures in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), and was recently reaffirmed as to both public officials and public figures by the Supreme Court in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974):

> "The *New York Times* standard defines the level of constitutional protection appropriate to the context of

> defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office *may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.* . . . Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures." (*Id.* at 342-43) (emphasis added).

Hotchner, as the court below held, is a public figure. Thus, the *New York Times* standards apply. Moreover, these standards are applicable to the invasion of privacy count as well as the libel count.* *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1974).

The *New York Times* standards were explained and applied by the Supreme Court in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). In that case, "the Court equated reckless disregard of the truth with subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Gertz*,

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* Although not always specifically designated, the discussion hereinafter relates equally to both counts of the amended complaint as the standards applicable to both are the same. Additional considerations relating only to the privacy count will be discussed at Point III, *infra*.

supra, 413 U.S. at 335, n. 6, quoting *St. Amant,* 390 U.S. at 731.

In *St. Amant,* the statement complained of implied criminal conduct on the part of the plaintiff. The Supreme Court specifically held that there was no obligation on the part of the publisher to check the statement or verify the facts, so long as it did not "entertain serious doubts" about the truth of the statement. 390 U.S. at 731. Further, the Court noted, it did not matter that the defendant publisher had no personal knowledge of the facts and that in making the statement, it relied solely on an affidavit without any indication of the affiant's reputation for veracity. 390 U.S. at 731.

Thus, under both the libel and privacy counts, Hotchner was required to prove by clear and convincing evidence that Doubleday published the statements about him with knowledge of falsity or with reckless disregard of truth or falsity. *Gertz* v. *Robert Welch, Inc., supra.* As already noted, there was no evidence that Doubleday *knew* that the statements about Hotchner were false, and there is no need to further consider or discuss that portion of the constitutional standard. It was simply never put in issue and the court so acknowledged after Hotchner had put in his evidence (342a).

The district court failed to properly apply the balance of this constitutional standard when, in denying Doubleday summary judgment, it held that evidence from which a jury could find that Doubleday had knowledge of the Spanish author's ill will was sufficient to raise an issue of fact as to reckless disregard of the truth (116a)—a ruling contrary to every decision since *New York Times* v. *Sullivan.* (See Judge Stevens' opinion in *Gertz* v. *Robert Welch, Inc.,* 471 F. 2d 801 at 807, n. 13 (7th Cir. 1972)). While the evidence showed that Doubleday recognized that uncomplimentary statements were made about Hotchner (Exhibits 5, 6, 7, 9, 10 and 11, 203a, 211a, 212a, 214a-216a), the mere fact that

Doubleday recognized these uncomplimentary statements does not equate to the "serious doubts" necessary before an investigation must be undertaken. Under the trial court's reasoning, every time an uncomplimentary statement is made and recognized by a publisher, it would (1) raise the issue of "serious doubt" and (2) equate the uncomplimentary statement with ill will merely because the statement had been made. This is not the law. Indeed, in *St. Amant* the charge was criminal conduct, much more serious than the statements herein, and yet the Supreme Court held there was no duty to investigate. Moreover, even if Doubleday did have knowledge of ill will by the Spanish author, this by itself is constitutionally insufficient to raise an issue of reckless disregard. (See, e.g., *Goldwater* v. *Ginsburg*, 414 F. 2d 324 at 342 (2nd Cir. 1969); *Gertz* v. *Robert Welch, Inc.*, 471 F. 2d at 807 n. 13)). Summary judgment should have been granted to Doubleday.

At trial, this same evidence was claimed to be sufficient to establish "reckless disregard". In his charge, the district judge instructed the jury that it could find "reckless disregard" if it found (1) that Doubleday had a clear reason to suspect the truth of the statements *and* (2) that an investigation would have shown that Castillo-Puche was untruthful about Hotchner. (757a-759a)

As to the first requirement, there was *no* evidence adduced at trial—let alone clear and convincing evidence—that Doubleday had reason to suspect the truth of the statements about Hotchner or entertained serious doubts about the statements concerning Hotchner.

Hotchner called no witnesses who testified as to any doubts expressed by Doubleday. None of his witnesses even *claimed* that Doubleday should have known that any of the statements about Hotchner were false.

Doubleday, on the other hand, put on the stand Kathryn Medina, the editor who had overall responsibility for the Book; William Austin, the assistant contracts manager who

reviewed eight pages (Exhibits 5A-5G, 203a-210a) containing most of the statements about Hotchner; Frank Hoffman, the copy editor who read the Book twice for inconsistencies and errors* after certain of the references to Hotchner had been eliminated, toned down or rewritten; and, by a mutually agreed-to written stipulation, Helen Lane, the independent translator (349a-350a) who prepared the English text for publication from the original Spanish work (196a). Mrs. Medina and Mr. Austin both testified that they had no reason to suspect that any of the statements about Hotchner might be false (360a, 375a). Hotchner's attorney did not raise this subject with either witness on cross-examination. Mrs. Lane, while she was translating, was reading "Carlos Baker's monumental definitive biography of Hemingway" (Exhibits S, U, and Y, 10a, 254a, 10a), the acknowledged authority on the *facts* of Hemingway's life, and she discovered "a number of misspellings and little errors of detail in Castillo-Puche" (Exhibit 16, 22a). None of the "little errors of detail" concerned Hotchner. Both Mr. Hoffman and Mrs. Lane testified, again without challenge on cross-examination, that the name Hotchner never came up in their discussion with or reports to Mrs. Medina (187a, 371a).

The only documentary evidence of whether Doubleday ever considered that any statements about Hotchner were false was Mrs. Medina's comment in her letter to Castillo-Puche, "you are certainly entitled to your opinion of Hotchner, and you may very well be right" (Exhibit 11, 217a). This simply cannot be squared with a claim that she knew or entertained "serious doubts" about their truth, especially since this comment relates not to the statements that appear in the Book, but to the original statements prior to revision or elimination by Doubleday.

* Although the copy editor's job is not to verify facts independently, to the extent that any of the statements about Hotchner were inconsistent with each other or appeared unlikely in view of the other statements made in the book, Mr. Hoffman would have called them to the editor's attention (369a-371a).

In denying Doubleday's motion for judgment n.o.v. (178a), the district court referred to documents in Doubleday's files as evidence of reckless disregard for the truth. An examination of these documents reveals that they prove the exact opposite, namely, that Doubleday exercised the care of a reasonable publisher and attempted in good faith to avoid libeling Hotchner. The Austin memo (Exhibit 9, 214a) is a compilation by a non-lawyer of certain uncomplimentary statements about Hotchner. Mr. Austin's expression of concern that the statements could not be substantiated refers only to the fact that the statements are either expressions of the author's opinion or a statement of Hemingway who he knew to be dead (375a, 379a, 380a). In any event, Mrs. Medina did eliminate and tone down these statements as recommended by Mr. Austin (Exhibits 5A-5G, 1 and 30 (Columns 2 and 3), 203a-210a, 230a. After she advised Castillo-Puche of this (Exhibit 11, 217a) he responded by letter (Exhibit 12, 219a) in which he (1) reaffirmed the truth of his comments about Hotchner, and (2) denied any intent to offend Hotchner:

> "I don't mind that you lighten the words with which I qualify Mr. Hotchner, specially taking away anything that could be used as a libel suit against me. Nevertheless, I don't want him to appear as a man who was in 's most sincere trust and as a possessor of all his secrets, like he made it look in his books. He was always a servant to Hemingway, who didn't mind much about him. To me he said once that Mr. Hotchner was a man he wouldn't want to be left alone in a room with.
>
> Even so, I have no interest in offendering [sic] Mr. Hotchner. You could then, as you said, send me the pages in which this toning down has taken place and I hope to be able to give my approval immediately." (Exhibit 12, 219a)

In fact, Doubleday had good reason to believe in the accuracy of Castillo-Puche's statements. Prior to publica-

tion, Doubleday knew that the author was well respected (316a) and that Destino, one of Spain's major publishers, had represented and warranted to Doubleday that the work was not libelous nor did it invade anyone's privacy (Exhibit 2, 201a). This was especially comforting since the Spanish work was published some seven years before Doubleday's Book. Also, Doubleday obtained a favorable book review and independently had been aware of two favorable outside reports from qualified experts prior to acquiring the rights to the Spanish work. (Exhibits S, Q and R, 246a-248a) One of these reports (Exhibit D, 245a), specifically preferred the Book to Hotchner's *Papa Hemingway*, stating:

> "nevertheless Castillo-Puche's reminiscences * * * have a sort of noble honesty clearly missing in Hotchner." (Exhibit Q, 246a)

Moreover, the close relationship of Castillo-Puche to Hemingway was demonstrated both pictorially and textually in the Spanish work, including reproductions of photographs of them together (Exhibit 26, 7a, Exhibits A, C, D, F, 9a), at a private swimming party (Exhibit E, 9a), at Hemingway's residence (Exhibit H, 10a) and in Castillo-Puche's Madrid office (Exhibit M, 10a); the reproduction of correspondence from Hemingway to Castillo-Puche (Exhibit N, 10a), their trip together to the bedside of the famous Spanish novelist, Don Pio Baroja (Exhibit G, 9a), and Hemingway's choice of Castillo-Puche to administer the Hemingway Prize for Spanish literature (Exhibit N, 10a). There was, indeed, no evidence that Doubleday had any doubts, much less serious ones, about the truth of the statements concerning Hotchner. This failure to prove the first aspect of the court's charge should have ended the jury's inquiry into the matter, or, as Doubleday contended in its motions to dismiss during the trial and for judgment n.o.v. thereafter, the court should have granted judgment dismissing the complaint.

Judge Stevens for the Seventh Circuit in *Gertz* affirmed the entry of a judgment in favor of a publisher notwith-

standing a $50,000 jury verdict for plaintiff. He held that the evidence of a publisher's failure to investigate was insufficient to constitute reckless disregard when the article was written by an author who the publisher "could reasonably assume to be trustworthy" and there was "no evidence that Stanley [the publisher] knew anything at all about plaintiff except what was contained in Stang's [the author] article." *Id.* at 806, 807.

Under the teachings of *St. Amant* v. *Thompson, supra,* and *New York Times, supra,* there was no duty to investigate unless Doubleday had *serious* doubts about the truth of the statements. Assuming *arguendo* that Doubleday suspected the truth of the statements, an investigation concerning them with the people closest to Hemingway would not have shown that they were false, but that they were virtually true, as the testimony of Hemingway's widow, Mary Hemingway, showed. Although Mrs. Hemingway disagreed with certain opinions of the author concerning her husband, she testified that the statements about Hotchner were reasonably accurate:

> Q. Mrs. Hemingway, at the time you read "Hemingway in Spain," did you think that any of the statements about Mr. Hotchner were unfair or inaccurate?
>
> A. No.
>
> Q. Have you reviewed the statements about Hotchner, the plaintiff is complaining of in this action?
>
> A. Yes.
>
> Q. Do you now feel that any of the statements about Mr. Hotchner are either inaccurate or unfair?
>
> A. No.
>
> Q. Do you feel that Castillo has presented a fair and generally accurate account of the events he describes at the fiesta in Pamplona in 1959?
>
> A. Yes, generally accurate. (388a)
>
> Q. Mrs. Hemingway, if asked by a Doubleday editor at any time prior to June, 1974, whether any of the statements about Hotchner which appear in "Heming-

way in Spain" were inaccurate, untrue or gave a false impression of Mr. Hotchner, what would you have told her?

A. I would never have noticed such statements.

The Court: If some editor from Doubleday specifically directed your attention to every one of the 17 or so pages on which Hotchner is named, and asked you whether those statements were true.

The Witness: I would have considered them true enough and accurate.

Q. Based on your experience and your observations that summer in Pamplona in 1959, do you think it would be possible for an observer such as Mr. Castillo to form an opinion that with regard to Ernest Hemingway, Aron Hotchner was a toady?

A. Quite possible. (389a)

Q. Do you think it would be likely for an observer such as Mr. Castillo to form an opinion with regard to Ernest Hemingway, that Hotchner was an exploiter of his reputation?

A. I think he might well make that conclusion.

Q. Do you believe it would be reasonable for someone to form that opinion?

A. Not unreasonable. (390a)

The testimony of Alfred Rice, Hemingway's attorney and agent, and Valerie Hemingway, his personal secretary in 1959 and 1960, supplemented Mrs. Hemingway's testimony with respect to the statements, and they were relatively long-time associates of Hemingway.* None of Hotchner's witnesses gave testimony concerning this point. George Plimpton was not in Spain and did not witness the events described in the Book; Mary Schoonmaker, a college

* In fact, on the summary judgment motion Hotchner contended that Doubleday should have confirmed the Spanish author's accounts not with the people he called as witnesses, but "with Hemingway's widow and with other persons in Spain during the periods described in the Book". (115a)

student in 1959 (322a) did not speak Spanish (333a); and Annie Davis, a Spanish resident who read the Spanish work in 1967, was obviously not concerned about the statements referring to her friend Hotchner, because she never called them to his attention (297t). And, as we have already noted, Castillo-Puche had advised Doubleday that while he had no objection to the revision of his text, he nonetheless reaffirmed his views about Hotchner. Contrast this failure of proof on Hotchner's part with the evidence adduced by Doubleday, and one must conclude that the investigation which Doubleday undertook was more than the law required, and any further investigation would not have raised serious doubts about the truth of the statements.

The actions of the Doubleday staff to which we have already referred (*supra*, pp. 10-12) not only negate the claim of serious doubts but affirmatively manifest careful regard for the propriety of the statements about Hotchner. Thus, Mrs. Medina, recognizing that some of the statements were not complimentary (Exhibit 6, 211a), asked the contracts department of Doubleday to approve them before publication (355a). The contracts department, to which any such problems are referred as a matter of Doubleday policy (372a, 374a), recommended that eleven separate statements should be toned down or eliminated (374a) and Mr. Austin wrote his memorandum to Mrs. Medina suggesting revisions (Exhibit 9, 214a). Most significant are the eight pages reviewed by Mr. Austin (Exhibit 5A-G, 203a-210a) which, when compared with the substituted language of the Book (Exhibit 1, 6a), show that substantial changes were made by Mrs. Medina, about which Mrs. Medina testified in some detail (355a-359a). Five of the statements mentioned in the Austin memorandum, including one entire quotation of Hemingway, were deleted; three were toned down; one, as found by the jury, was not defamatory and only two others—"two-faced behavior" and "exploiter of his reputation" were left in the Book. Rather than showing reckless disregard for the truth,

these actions are clear evidence of a lively concern for Mr. Hotchner.

As if in acknowledgment of the same, Hotchner's counsel did not cross-examine any of the Doubleday witnesses with respect to the issue of recklessness. Instead, he sought to show reckless disregard from evidence (i) that the Book contained numerous inaccuracies, and (ii) that Doubleday should have known that Castillo-Puche had ill will toward Hotchner. First, it should be noted that the alleged inaccuracies were few and innocuous: it appeared that Mary Hemingway's foot was not broken (her toe was, 550t), but there was no question that her injury was sustained in a manner described by Castillo-Puche (550t-553t); Ernest Hemingway did not stop to make phone calls as his entourage rolled back and forth across the square of Pamplona (460t, 560t), but the rest of the description was confirmed by all witnesses; and Hemingway was not naked when he beat his chest and dove into the river in Navarre (557t), but the chest beating and diving into the river were confirmed.

In none of these statements was danger to reputation apparent. Nor were any of the statements inconsistent with each other, or of such a nature that Doubleday should, or even *could*, have known or suspected that they were false. On their face there was nothing about these statements that would have caused the most prudent editor or publisher to doubt their accuracy or the veracity of the author. Yet these inaccuracies, especially when coupled with the trial court's instructions on invasion of privacy and falsification (see Point III), poisoned the jury against Doubleday and totally destroyed the constitutional protection to which it was entitled.

Hotchner's second line of proof of reckless disregard was to show that Doubleday should have known that the Spanish author had feelings of ill will toward Hotchner. As stated, the district court relied solely on this argument in improperly denying summary judgment. There is no

legal precedent for allowing a finding of reckless disregard of the truth against a *publisher* solely on evidence of its knowledge of an *author's* ill will. Cases have held that a jury may consider an author's motive and ill will in finding reckless disregard, but always as to *the person who had such motive or ill will.* Proof of ill will *alone* as to anyone, much less to attribute it in this case to the publisher, is insufficient to support a finding of reckless disregard. As Judge Stevens for the Seventh Circuit in *Gertz* stated:

> "One distinction which is lost in some of plaintiff's arguments should be kept in mind. . . . '[I]ll will toward plaintiff or bad motives, are not elements of the *New York Times* standard'. *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 52 n. 18, 91 S.Ct. 1811, 1824, 29 L.Ed.2d 296 (opinion of Mr. Justice Brennan). Thus, the kind of malice which will, for example, defeat a conditional privilege in the traditional tort law of libel, will not satisfy the *New York Times* standard. However bad its motives, a publisher is protected by the First Amendment as long as the allegedly libelous statements were not made with knowledge or falsity or with reckless disregard of whether they were true or false." (471 F.2d at 807 n. 13).

Thus, neither of these lines of proof can logically or legally lead to a finding that Doubleday published with reckless disregard or ever entertained serious doubts as to the truth of the statements about Hotchner when it published them. Even taken together, these two factors do not approach the level of culpability mandated by the Supreme Court in its requirement that a public figure prove reckless disregard of truth or falsity.

Parenthetically, if the documents (Exhibits 7, 9, 11, 212a, 214a, 216a) relied upon by the district court (179a) in sustaining the jury finding of reckless disregard for the truth are deemed sufficient by this Court, it would mean that Doubleday would have been better off doing nothing with

respect to the statements about Hotchner—not eliminating some—not toning down or changing others. Put another way, in this case a reasonable investigation and attempt to eliminate or tone down uncomplimentary remarks, about which a publisher had no doubt concerning their truthfulness, is being used against Doubleday. If Doubleday had done nothing, no document could be used against it. That this evidence from Doubleday's own file is enough to find liability could have a deleterious effect throughout the entire publishing industry, as the normal procedure of raising questions about uncomplimentary (commonly referred to as "potentially libelous") remarks might be abandoned in favor of keeping the record clean and doing nothing.* The only other solution for a publisher who has flagged uncomplimentary remarks is to remove everything that is not susceptible to one hundred percent proof of truth. The "chilling effect" of this possibility could be devastating.

In determining the existence of "reckless disregard", the Supreme Court has held that failure to check the accuracy of the information published with material that happens to be in the defendant's possession (*New York Times Co.* v. *Sullivan, supra*); lack of ordinary care in making charges against a plaintiff (*Garrison* v. *Louisiana*, 379 U.S. 64 (1964)); mere negligence (*New York Times Co.* v. *Sullivan*); and failure to substantiate information supplied by

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* Indeed, since there was uncontradicted evidence that in the publication of the Book Doubleday followed the established procedures prevalent in the publishing industry, even under the less stringent standards applicable where the plaintiff is neither a public figure nor a public official, but the statement involves a matter which is "arguably within the sphere of legitimate public concern", *Chapadeau* v. *Utica Observer-Dispatch*, 38 N.Y. 2d 196, 199, 379 N.Y.S. 2d 61, 64, 341 N.E. 2d 569, 571 (1975), it would be impossible for Hotchner to recover in this action. As the New York Court of Appeals stated in *Chapadeau, supra:* "To warrant such recovery he [plaintiff] must establish, by a preponderence of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties". (*Id.* at 38 N.Y. 2d 199, 379 N.Y.S. 2d 64, 341 N.E. 2d 571)

an unverified informer (*Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971)) is not sufficient. Based on the foregoing authority, there can be no basis for a finding in this case that Doubleday published statements about Hotchner with reckless disregard for the truth. There was no evidence that Doubleday had any doubts, let alone serious ones, concerning the truth of the statements about Hotchner. Doubleday had no contradictory evidence in its files or known to its employees; it followed its normal and established procedure in publishing the Book, including: two preliminary independent readings of the Spanish work, a warranty from the Spanish publisher that the work was not libelous nor did it invade privacy, thorough reviews by the editor, additional review of uncomplimentary statements about Hotchner by the assistant contracts manager, and final approval and confirmation by the Spanish author of the statements about Hotchner and then further review by the copy editor; it knew of the excellent reputation enjoyed by the Spanish author and publisher; it knew that the Spanish work had been in print for seven years without being questioned or challenged; and it had unimpeachable evidence, in the form of pictures in the Book, that Castillo-Puche had in fact been in a position from which he was qualified to make personal observations of Hotchner, and of Hotchner's relationship to Hemingway.

At the very least, the evidence indicates that the statements which the jury found to be libelous were not made with a high degree of awareness of probable falsity or serious doubts or under any other circumstances which would permit a plaintiff to recover according to the actual malice standards espoused by the United States Supreme Court. Therefore, as a matter of law, the statements about Hotchner were not made with actual malice and the judgment below should be reversed and judgment entered in favor of Doubleday dismissing Hotchner's complaint.*

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* At the very least, this Court should set aside the jury verdict as being against the weight of the evidence and order a new trial. (See, e.g., *Oliveras* v. *American Export Isbrandtsen Lines, Inc.*, 431 F. 2d 814 (2d Cir. 1970); 6A Moore's Federal Practice §59.08(5) (2nd ed. 1948)).

POINT II

The Six Statements Found by the Jury to be Libelous and Invasive of Hotchner's Privacy Are Not Actionable as a Matter of Law Because Five of the Statements Are Clearly Expressions of the Author's Opinion While the Record With Respect to the Sixth Establishes That It Was Not Published With Reckless Disregard of the Truth

The Statements of the Spanish Author's Opinion

It is well established that the law of libel draws a clear distinction between statements of opinion, criticism or comment and unequivocal statements of fact. When reasonable and based upon personal observation of facts and circumstances, statements of opinion are not actionable since they qualify as fair comment and criticism. See, e.g., *Gertz* v. *Robert Welsh, Inc.*, *supra*; *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

In this case nineteen allegedly libelous passages were submitted to the jury (151a); only six were found to be libelous (152a, 154a, 156a, 157a, 164a, 166a). Five of these were clearly expressions of the Spanish author's opinion of Hotchner.

This Court's recent opinion in *Buckley* v. *Littell*, *supra*, requires that the defense of fair comment be applied to these five statements because such statements clearly reflect the *opinion* of the Spanish author based upon *facts* which he had the opportunity to observe. In *Buckley*, this Court interpreted *Gertz* v. *Robert Welch, Inc.*, *supra*, as holding that an expression of "pure opinion" may not be the basis of an action for defamation (*Id.* at 896) and further that:

> "When we confront the constitutional law of libel, it is at once evident, as set forth first in *New York*

> *Times Co.* v. *Sullivan, supra,* that our primary concern must be the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks. . . ." 376 U.S. at 270. [Citation omitted]. From this premise proceeds the conclusion, made explicit in *Gertz* v. *Robert Welch, Inc., supra,* that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. at 339-40. [Citation omitted]. (*Id.* at 889).

At trial, the district court indicated that it was aware of the distinction between statements of fact and opinion and further that the Spanish author had expressed his opinion about Hotchner. Indeed, during one exchange with the attorneys with respect to the allegedly libelous statements the court stated:

> "You see, I am not so concerned with Puche's opinion. Puche is entitled, within reason, to have an opinion. Puche regards this fellow [Hotchner] in an unflattering fashion and that's Puche's honest opinion. I don't think you get very far with that." * (405t)

A statement of opinion is protected as fair comment even when the supportive facts are not true. As stated

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* Although Doubleday argued in its motion for judgment n.o.v. that these five statements were expressions of opinion and thus not actionable, and although the above quoted language indicates that the trial court recognized the statements as expressions of the Spanish author's opinion, the district court, even after *Buckley* had been cited to it, never discussed "opinion" in its decision denying Doubleday judgment n.o.v. (174a).

by the Court of Special Appeals of Maryland in *Kapiloff* v. *Dunn*, 27 Md. App. 514, 343 A. 2d 251 (1975), *cert. den.*, —— U.S. —— (1976);

> "Opinions based on false facts are protected if the publisher was not guilty of actual malice with regard to these supportive facts." (343 A.2d at 263).

An examination of the "supportive facts" for each of the five statements of opinion unequivocally discloses that Castillo-Puche's opinions were based on facts and personal observations which, at the very least, would preclude a finding of publication with reckless disregard of the truth. Clearly, Castillo-Puche had the opportunity to observe Hemingway and his entourage at Pamplona in 1959, as is evident from the events described in the Book, the photographs of Ernest Hemingway, Hotchner and the Spanish author taken at Pamplona in 1959, the Gaceta article which Castillo-Puche wrote about the Hemingway visit in 1959 (Exhibit 34, 8a), the testimony of Hotchner (288t-289t, 291t-292t), of Annie Davis (328a-329a) and of Doubleday's witnesses, Mary (384a-385a) and Valerie Hemingway (382a-383a). Hotchner was a member of that Hemingway entourage.

We now consider each of the five statements of opinion (passage references are to the Special Verdict (151a)):

> *Passage 2.* "It was Ordonez, as I remember, who first called him 'Freckles', and the nickname stuck. He pretended not to mind and was good-natured about everything, but he was such a *toady* at times that it was sickening." (Emphasis added) (152a).

The substantial truth of the greater part of this passage —that Hotchner's nickname was "freckles" and that it was Ordonez who first called him that—was agreed to by all witnesses including Hotchner. Hemingway mentioned it himself in *The Dangerous Summer*, a series of articles published in Life Magazine (Exhibit 29c, p. 78). The

remainder of the sentence is clearly Castillo-Puche's opinion. Mary Hemingway testified on cross examination that she considered Hotchner a toady (532t) and Valerie Hemingway said that many people deferred to, and therefore were "toadies" to Ernest Hemingway (418t). The remainder of his comments in the Book bear out that the statements were Castillo-Puche's honest reaction to, and opinion of, Hotchner. Moreover, Castillo-Puche described Hotchner's manner toward Hemingway and concluded that it was obsequious (Exhibit 1, page 82). He also stated that Hotchner was "very careful to be properly attentive to Mary and extremely polite to her and the other guests, but he kept his eye on Ernesto every minute, watching his every move and listening to his every word, especially when he was approached by journalists or photographers" (Exhibit 1, page 196). Surely these facts which Hotchner never denied and which the jury did not find libelous permitted the author to conclude that Hotchner was a toady.

> *Passage 4.* "The thing I disliked most about Hotchner was his *two-faced behavior* toward people who were Ernesto's real friends, people such as Juanito Quintana and even Ordonez. Though he was very clever at hiding his true feelings, you could tell that Hotchner was really a *hypocrite*. But he put up a very good front as Ernesto's mild-mannered, obedient servant." (Emphasis added) (154a).

At trial Hotchner admitted that he was annoyed at Quintana for failing to secure bullfight tickets and lodging for the Hemingway entourage. According to Hotchner, Quintana had squandered the money Hemingway gave him (166t). Castillo-Puche undeniably had the opportunity to observe the way Hotchner acted toward Hemmingway's Spanish friends when Hotchner was in Hemingway's presence, and when he was not. By observing Hotchner's actions and mannerisms toward Hemingway's Spanish friends, he formed the opinion that Hotchner was "two-

faced" or was a "hypocrite". Again, this is clearly the Spanish author's opinion and he says so in the opening of the passage. No evidence was introduced at trial to the effect that Castillo-Puche did not observe these relationships or that he did not believe in his honest opinion that Hotchner was a hypocrite. That he had the opportunity to make these observations is substantiated by the testimony of Mary (384a-385a) and Valerie (382a-383a) Hemingway and Annie Davis (288t-289t, 291t-292t, 328a-329a).

Passage 6. "Hotchner did his best all summer long to make the imaginary duel between Ordonez and Dominguin a real one; in moments when Ernesto was tense or had no one around for company, he was half convinced he was witnessing a genuine 'civil war' in the bullfight world, though I for my part thought the whole affair was a big laugh, and almost everyone else did too.

As an expert at grinding out publicity in the United States, Hotchner knew what a big splash Ernesto's articles were going to make, and was already bragging about what a coup they would be.

I felt very bad about those *Life* articles, called *The Dangerous Summer*, to tell the truth, because it seemed to me that the whole farce was beneath Ernesto and that he should have refused to have anything to do with it.

'Freckles' was never open and aboveboard. His mild manner and his air of shy deference seemed to me quite a cover-up for his exploitation of Ernesto." (156a)

Passage 14. "'Freckles' was in complete control of the situation, and I wasn't at all surprised that he had earned lots of money for Ernesto by signing him up with the television networks and mass-circulation American magazines, though I was quite certain Hotchner had been motivated by something other than worshipful admiration for a great writer." (164a)

Passage 16. "Only a woman like Mary could have put up with those two ridiculous figures who hung around Ernesto every minute: Davis the jealous watchdog of his fame and fortune and Hotchner the exploiter of his reputation. Only Mary knew that Ernesto's real riches were intangible, and therefore she allowed him and Davis and Hotchner to do as they pleased. *It is possible that his two American friends may have sincerely thought they were looking after his interests and protecting him.*" * (166a)

The facts upon which each of these passages are based were admitted in the Stipulation of Uncontroverted Facts (191a) and in the testimony of Alfred Rice (475t-487t), Hotchner's former attorney and agent who served in the same capacity for Hemingway. The Life Magazine articles entitled *The Dangerous Summer* (Exhibits 29a, 29b, 29c, 8a) confirm the duel between Ordonez and Dominguin and the publicity that it generated. By 1959, Hotchner had admittedly earned huge sums from adapting Hemingway works. In addition to the knowledge and personal observations of Castillo-Puche in 1959, by the time Castillo-Puche wrote his book in 1967 Hotchner had earned close to a million dollars in projects involving the name of Ernest Hemingway. When it is admitted that Hotchner earned almost a million dollars writing about or adapting Hemingway works, the statements calling Hotchner an "exploiter" of Hemingway's reputation (passages 6 and 16) or indicating that "Hotchner had been motivated by something other than worshipful admiration for a great writer" ** (passage 14), are, at the very least, not unreasonable expressions of opinion. Indeed, upon these undisputed facts, and the

* The last sentence in this passage (emphasized) irrespective of all other considerations, should preclude a finding that the passage defames Hotchner.

** The finding by the jury that this passage is libelous is clearly inconsistent with its earlier finding that Passage 11 (161a)—"he's [Hotchner] out for number one"—is not.

fact that Hotchner wrote a Hemingway biography—*Papa Hemingway*—for substantial profit, even if these passages were construed to be statements of fact rather than opinion, there is simply no room for a finding that the statements are false or otherwise defamatory. Certainly no contrary evidence was offered at trial to the effect that at the time he was writing, Castillo-Puche could not have formed these opinions.

That the quotations in issue are statements of opinion is again made clear by the Spanish author. The passages are filled with personal interjections of Castillo-Puche: "I for my part thought"; "I felt very bad"; "it seemed to me" (passage 6); "I wasn't at all surprised"; "I was quite certain" (passage 14). Thus, not only are these clearly expressions of opinion, but the reader is constantly told that these are Castillo-Puche's opinion.

In short, as this court in *Buckley* held with respect to the terms "fellow traveler", "facism" and "radical right", the terms "toady", "hypocrite" or "exploiter of Hemingway's reputation":

> ". . . whether as used by Littell [Castillo-Puche] or as perceived by a reader, are concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity. The use of these terms in the present contex' 's in short within the realm of protected opinion and idea under *Gertz*." (*Id.* at 894).

Because the statements were opinions based upon admitted or substantiated facts and the personal observation of Castillo-Puche, they were, as a matter of law, not actionable.

The Sixth Passage.

The sixth passage (Passage 7 from The Special Verdict) found by the jury to be defamatory of Hotchner is as follows:

7. "Then he dropped the subject of Davis and started in on Hotchner: 'He's a little precious, but he's a very smart cookie.'

'I can see that he's very fond of you,' I replied.

Then, a little while later, he'd whispered, *'I don't really trust him, though'*." (Emphasis added) (157a).

This passage is the quotation of a conversation between Hemingway and Castillo-Puche, the last emphasized sentence being a remark attributed to Hemingway about Hotchner. As to those statements which were not expressions of opinion, but were statements attributed to Hemingway about Hotchner, the district court erroneously held that Doubleday had to prove either that Hemingway in fact made the statement or that "it's more likely than unlikely that the statements were in fact made" (402t). Under Federal libel law, the burden should have been on Hotchner to prove by clear and convincing evidence that Hemingway did not make this statement.

It was established that neither Hotchner nor any one of his trial witnesses was ever a party to or heard *any* conversation between Hemingway and Castillo-Puche, and Hotchner himself admitted that he did not speak or understand Spanish. Doubleday, on the other hand, called witnesses who spoke and understood Spanish and who testified that Hemingway and Castillo-Puche were friends and conversed in Spanish. And it was their testimony that it was more likely than not that Hemingway would have made this statement about Hotchner.

However, irrespective of the likelihood of Hemingway having made the statement or one similar to it, the record of its publication precludes a finding that it was published with reckless disregard for the truth. Initially this statement appeared in the manuscript (the Lane translation) in a much more derogatory form as follows:

> "Yes, that's true, but he's [Hotchner] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." (Exhibits 5d and 30, 206a, 231a).

When Mrs. Medina revised this, she virtually eliminated the dubious sexual characterization so that the sentence read "I don't really trust him, though". Moreover, when she sent the revisions to Castillo-Puche, he wrote back, long before he knew this statement would be the basis of a libel action, and reconfirmed that:

> "Ernest did not always talk highly of him [Hotchner]. To me he said once that Mr. Hotchner *was a man that he wouldn't want to be left alone in a room with.*" (Emphasis added) (219a, Exhibit 1).

In short, before this statement was published, Doubleday substantiated the specific remark with the only person who heard it. He confirmed both the idea expressed and the more offensive language used by Hemingway. Yet Doubleday did not return to the more derogatory version, but published the idea in the least offensive manner. Therefore, as a matter of law, the record with respect to the publication of Passage 7 precludes a finding that it was published by Doubleday with reckless disregard.

POINT III

The Invasion of Privacy Claim Should Have Been Dismissed as a Matter of Law.

Asserting the same factual grounds as alleged in the first count, the second count of the amended complaint sought damages for a violation of Section 51 of the New York Civil Rights Law.* Prior to answering the original

* Section 51 provides in relevant part: "Any person whose name, portrait or picture is used within this state for advertising pur-

complaint, which pleaded the identical count, Doubleday moved to dismiss the privacy count on the grounds that Hotchner and his name were incidental to the main theme of the Book—appearing on only 15 pages of the 388 pages relative to the visit of Hemingway and his entourage to Pamplona in 1959. Doubleday also contended that since Hotchner's name and picture had been used in connection with a matter of public interest, it had not been used for purposes of trade and thus he had no basis for a claim under Section 51. The court prior to trial denied the motion. On renewal of the motion at trial, the district court dismissed that part of Hotchner's claim which sought damages for the use of his picture but denied the motion to the extent that his name and incidents of his life (no incidents of Hotchner's life are contained in the Book) had been fictionalized (342a-343a). On what was left of the claim, the jury returned a verdict of $1.00 in compensatory damages and $125,000 in punitive damages for invasion of privacy.

The common law of New York recognizes no right of privacy. *Robertson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902); *Flores* v. *Mosler Safe Co.*, 7 N.Y. 2d 276, 196 N.Y.S. 2d 975, 164 N.E. 2d 853 (1959). A claim for invasion of privacy in New York can only be based—and Hotchner's claim was *expressly* so based—on Section 51 of the Civil Rights Law. Thus, the trial court's and Hotchner's reliance upon a "false light" theory of invasion of privacy and upon *Cantrell* v. *Forest City Publishing*

(continued from p. 29)
poses or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. . . ." N.Y. Civ. Rts. Law §51 (McKinney 1976).

Co., 419 U.S. 245 (1974), throughout this action, was totally misplaced. *Cantrell* involved the common law right of privacy existing in *Ohio* or *West Virginia* and it had nothing whatsoever to do with Section 51.

At trial, the jury was instructed that it could find for Hotchner on the privacy count if it found that Hotchner had been "portrayed in a false light or as a participant in fictionalized events or conversations" * (Special Verdict Question 23, 170a). The jury was further instructed that the use of Hotchner's name in false statements satisfied the definition of "purposes of trade" (444a-449a). This instruction is without basis in New York law. The few times that Hotchner is mentioned in the book, he is mentioned as part of a factual story—the visit in 1959 of the Hemingway entourage to Pamplona.

Since the Book is one of non-fiction, Hotchner's claim, if he has one, must be for libel based upon inaccuracies or mistakes since the use of one's name in false statements is not within the meaning of "purposes of trade", as that term is used in Section 51 of the New York Civil Rights Law.

Hotchner, and apparently the court, as evidenced by its charge, sought to justify the privacy count on the basis of *Spahn* v. *Julian Messner, Inc.*, 21 N.Y. 2d 124, 286 N.Y.S. 2d 832, 233 N.E. 2d 840 (1967), a case in which the New York Court of Appeals held:

> "[B]efore recovery by a public figure may be had for an unauthorized *presentation of his life*, it must be shown, *in addition to* the other requirements of the statute, that the presentation is infected with *material and substantial* falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth." 21 N.Y. 2d at 127,

* Nowhere in the Book is any conversation attributed to Hotchner.

286 N.Y.S. 2d at 834, 233 N.E. 2d at 842 (emphasis added).

The publisher of *The Warren Spahn Story* obviously used the name Spahn for purposes of trade. The Spahn book purported to be Spahn's biography and books were sold on the strength of his name.*

The *Spahn* rule is expressly limited to an unauthorized *presentation* of a public figure's life. It does not cover *incidental* mentions of a public figure in a book. The progenitor of *Spahn* was *Koussevitzky* v. *Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S. 2d 779 (Sup. Ct. N.Y. Co. 1947), aff'd 272 App. Div. 759, 69 N.Y.S. 2d 432 (1st Dep't), where the court refused to enjoin the publication of a *biography* about Serge Koussevitzky, an eminent conductor and music figure. Faced with allegations that the book contained untruthful and fictitious matter, the court noted: *"That it may contain untrue statements does not transform it into the class of fiction"*, and *"Truth or falsity does not, of itself, determine whether the publication comes within the ban of sections 50 and 51."* 188 Misc. at 484, 68 N.Y.S. 2d at 783 (emphasis added). Of equal importance, however, is the fact that the court was again, as in *Spahn*, looking at a *biography* of the plaintiff, not an incidental mention of plaintiff in a book about someone else. *See, also, Rosemount Enterprises, Inc.* v. *Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S. 2d 122 (Sup. Ct. N.Y. Co. 1968).

The trial court's misunderstanding or misapplication of the *Koussevitsky* case is shown by its comment with respect to it at a precharge conference. Recognizing that Hotchner is a minor character who is mentioned only incidently in the Book, the court attempted to justify the privacy count

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* The trial judge found that: "defendants have used Spahn's name and pictures to enhance the marketability and financial success of the subject book . . .". 43 Misc. 2d 219, 233; 250 N.Y.S. 2d 529, 543 (Sup. Ct. N.Y. Co. 1964).

and its charge with respect thereto on the grounds that the plaintiff in *Koussevitzky* was a "minor characer". The court stated:

> "I don't think being a minor character is that important.
>
> . . . .
>
> Koussevitzky was certainly not the principal character . . . . Koussevitzky was a relatively minor character." (413a)

Nothing could have been further from the truth. As the court said in *Koussevitzky*:

> "The book we are considering, deals almost entirely with plaintiff's [Koussevitsky's] musical career." (188 Misc. at 484, 68 N.Y.S. 2d at 783).

Not only was the trial court's charge to the jury regarding the definition of purposes of trade incorrect, the charge failed to specify the degree of falsification the jury would have to find (assuming other statutory requirements were met) and permitted recovery on much less stringent grounds than are required for recovery for libel. The Book's casual references to Hotchner do not come up to the *Spahn* level of biography "infected with material and substantial falsification". This failure left the jury with the impression if Mary Hemingway did not break her foot, or if Ernest Hemingway did not like to use the phone, there was falsification sufficient to invade Hotchner's privacy.

Likewise, the district court's insistence on referring to "false light" as a theory under which the second cause of action could be sustained—specifically in the Special Verdict question (23), "Was A.E. Hotchner portrayed in a false light . . ."—is contrary to established New York law. False light is a common law theory of invasion of privacy, Restatement (Second) Of Torts §652E (Tent. Draft 22, 1976); *Cantrell* v. *Forrest City Publishing Co., supra,* and no New

York court has awarded recovery to a plaintiff who claimed that he was portrayed in a "false light" without meeting the statutory requirements of Section 51.

Furthermore, at trial Hotchner introduced no evidence that his name had been used for advertising purposes or for purposes of trade, as required by the New York Civil Rights Law, §51. There was no evidence that the inclusion of Hotchner's name in the Book enhanced sales or in any way resounded to Doubleday's commercial advantage. On the contrary, Doubleday's editor testified that Hotchner's name was not used in connection with any sales or promotion of the Book (364a-365a). Moreover, the Book is about Ernest Hemingway, not Hotchner. Hotchner's name is not used until page 82 of the Book and, as stated, it is mentioned a total of seventeen times on approximately fifteen pages of the 388 page Book. Therefore, the jury's finding that plaintiff's name was used for advertising purposes or purposes of trade was erroneous as was the court's charge on this count.

As a matter of law, the second count should have been dismissed.

POINT IV

Prejudicial Error Was Committed in the Conduct of the Trial.

The improper admission or exclusion of evidence is a ground for a new trial, provided it is prejudicial. 6A Moore's Federal Practice §59.08(2) (2d ed. 1948). During the course of this trial, several kinds of proof were admitted into evidence over the objection of Doubleday's counsel. Furthermore, the court did not permit Doubleday's counsel to pursue several lines of questioning that were highly relevant and necessary to Doubleday's defense. Each of these rulings, both separately and when considered cumulatively, was prejudicial to Doubleday's case and is cause for the granting of a new trial.

1. The admission of Hotchner's Exhibit 30 (230a), the Purczinski Translation

A major part of Hotchner's argument with respect to reckless publication by Doubleday is that Castillo-Puche's ill will toward Hotchner could be imputed to Doubleday even though Doubleday was not aware of the particular factual circumstances claimed to evidence such ill will. In furtherance of this contention Hotchner offered and the court admitted a translation of the Spanish passages relating to him. This translation was made by Professor Purczinski, an alleged "expert", with help from others (48t). It was made one week before trial and it is apparent that Doubleday could not have seen it prior to publication of the Book. Purczinski's translation contained statements about Hotchner which were much more offensive and derogatory than anything said about Hotchner in the original Lane translation or in the Book (for example, Purczinski called Hotchner a "shitlicker" and "leader of a Chicago or New York gang" (230a, 23[illegible]).

The tortured reasoning underlying the argument for admissibility of the Purczinski translation runs thus: Mrs. Lane could have translated the Spanish as did Purczinski and the violence of the sentiments expressed by Castillo-Puche in Purczinski' translation should have made her aware that Castillo-Puche bore ill will to Hotchner. As Doubleday's translator, she was an agent of Doubleday, and consequently her knowledge must be imputed to Doubleday.

The argument is illogical and legally untenable. First of all, as we have already noted, the author's ill will cannot be attributed to the publisher. (*Gertz* v. *Robert Welch, Inc.*, *supra*, at 807 n. 13). The requirement that the plaintiff shall prove knowledge of falsity or reckless publication by Doubleday is not met by proof that Castillo-Puche held Hotchner in low esteem. Nor, even if it were the law that Castillo-Puche's alleged animus was to be imputed to Mrs. Lane because she could have read the Spanish as

Purczinski did, there was no evidence whatever that Lane was Doubleday's agent, or if she was, that she ever conveyed such knowledge to Doubleday. As a matter of fact, Mrs. Lane was an independent contractor (196a-198a; 349a-350a) who performed her duties as a translator without direction from Doubleday. On the face of it, it would have been an act of supererogation for Doubleday to supervise the translation of the Spanish work. Indeed in *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920), the New York Court of Appeals refused to charge a defendant publisher with the specific and admitted knowledge of its own employee, as opposed to an independent contractor, that the employee was aware of an author's common law malice toward the plaintiff when the employee acquired such information outside the scope of his employment.

The Purczinski translation should not have been admitted because "its probative force is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury". Fed. R. Ev. §403. At the time that the Purczinski translation was admitted, the record was clear that Doubleday knew that Castillo-Puche believed in the truth of his statements about Hotchner. Purczinski's translation was designed to inflame the jury, and it is obvious that it was effective, and seriously prejudicial to Doubleday.

Finally, the Purczinski translation is at best nothing more than another person's opinion of the translation of the Spanish edition (264a). It had no bearing or relationship to the relevant questions at issue because Doubleday never saw it prior to publication. No authority, identical or analogous, has been or could be cited to support its admission. As a matter of law, the Purczinski translation was irrelevant, without an adequate evidentiary foundation, prejudicial and of no probative value. It should have been excluded.

2. The admission of testimony concerning minor inaccuracies that were not defamatory, and did not refer to Hotchner

An extraordinarily large percentage of the testimony elicited on both direct and cross-examination by Hotchner's counsel, over a standing objection by Doubleday, related to passages in the Book that were not at issue in this action, were not defamatory, and did not refer to Hotchner either by name or implication. The court properly rejected this line of questioning when it was first attempted, while Hotchner was on the stand (283a). On subsequent days, however, when Hotchner's counsel questioned other witnesses on passages totally unrelated to Hotchner (e.g. Hemingway's use of the telephone: Mary Hemingway's broken leg), the court did not adhere to this ruling.

It was Hotchner's contention that these factual inaccuracies tended to show Doubleday's reckless disregard of the truth *in general*, from which the jury might infer a reckless disregard of the truth in connection with the statements at issue in the action. Absent a showing, however, that the inaccuracies had been called to Doubleday's attention, that they were defamatory, or that Doubleday was aware of them or even should have been aware of them, there is no room for the jury to infer reckless disregard of the truth on the part of Doubleday either with respect to the Book in general or more particularly, the statements about Hotchner. See *Clevenger* v. *Baker Voorhis & Co.*, 19 App. Div. 2d 340, 243 N.Y.S. 2d 231 (1st Dep't 1963); aff'd, 14 N.Y. 2d 536, 248 N.Y.S. 2d 396, 197 N.E. 2d 783 (1964).

Hotchner offered no evidence that Doubleday knew or should have known about the inaccuracies. The alleged inaccuracies raised by Hotchner were not matters that anyone who was not a member of the Hemingway entourage in 1959 would question. Therefore, Hotchner's evidence concerning any such inaccuracies was irrelevant to the issue of whether Doubleday entertained serious doubts as to the truth of the statements about Hotchner or had reason

to have such doubts. Worse, it was highly prejudicial, misleading and confusing to the jury. There existed a very real danger that the jury would believe, from the extended questioning by Hotchner's counsel and the trial court's refusal to exclude or even meaningfully limit such questioning, that Doubleday's conduct could be judged by whether the Book contained inaccuracies, rather than the constitutionally required test of whether it contained inaccuracies about Hotchner of which Doubleday was, or should have been, aware.

3. The court's refusal to allow Doubleday's counsel to inquire into events and opinions subsequent to 1959

The Spanish work was published in 1967. In reporting events and giving his opinion of people he met in 1959 and 1960, the author was entitled to consider and be influenced by any facts at his disposal at the time he wrote. It is of equal relevance that Doubleday did not publish the Book until 1974. What Doubleday knew or should have known must be judged at the time it published the Book. Doubleday is not required to evaluate the statements in the Book as if the year were 1959.* Indeed, to ignore events that occurred and information acquired between 1959 and 1974 would be evidence of reckless disregard for the truth. In evaluating the statements about Hotchner, the jury was entitled to know about Hotchner and the Hemingway-Hotchner relationship as of 1974. To this end, the testimony of Valerie Hemingway, Mary Hemingway and Alfred Rice concerning their knowledge or opinion of Hotchner at any point up to 1974 should have been admitted, and its exclusion by the court was prejudicial error. For example, that Hemingway's wife and Hotchner engaged in protracted and bitter litigation over Hotchner's use of Hemingway's

*After Doubleday had all but completed its case the court recognized that the Book discussed events which occurred in 1960 and belatedly informed Doubleday's counsel that he could recall his witnesses to inquire about that one additional year only (539t-540t).

material in *Papa Hemingway* (see *Estate of Hemingway* v. *Random House, Inc.*, 23 N.Y. 341, 296 N.Y.S. 2d 771, 244 N.E. 2d 250 (1968)) certainly was relevant to the statement that Hotchner "exploited Hemingway's reputation". Yet Doubleday was precluded from such inquiries.

4. The court's charge was prejudicial

(a). The trial court's introduction of the "clear and convincing" standard stating that it "differs *slightly* from the burden of proof that applies in the ordinary civil case" (420a) (emphasis added) was prejudicial to Doubleday in that it allowed the jury to conceive of such standard as being close to the "preponderance of evidence" standard when in fact it is not.

(b). The Lane translation was not received to assist the jury "in determining whether Doubleday knew that the statements made were false," (426a, 427a) and the court's statement that the jury could use or rely on the translation to make such a finding was prejudicial. Nor did Hotchner ever contend "that the statements contained in the Lane translation . . . put Doubleday on notice of the falsity of Castillo-Puche's writing" (427a). Such an inference by the court was both unwarranted and prejudicial.

(c). The court's instruction that the jury might consider that a witness had been "fencing", as a reflection on the credibility of that witness (430a), prejudicially implied to the jury that the court questioned the testimony of Mary Hemingway, one of Doubleday's witnesses. The court had rebuked Mrs. Hemingway for "fencing" with Hotchner's attorney during her testimony (558t), and the jury could not help but associate that comment with the Charge, as that somewhat unusual word was used only those two times during the trial.

(d). The court's definition of recklessness was incorrect and highly prejudicial in its negative implication that if Doubleday did not sincerely believe that the statements

were true, then it acted recklessly (440a). Hotchner's burden was to prove that Doubleday knew the statements were *false* or had *serious doubts* about their truth. If Doubleday had no belief either way, Hotchner's burden is not met, despite the implication of this instruction. In effect, the instruction with respect to actual malice was emasculated.

(e). As mentioned above, no evidence was introduced from which a jury could properly conclude that Mrs. Lane was Doubleday's agent, and this should not have been charged at all (442a). The court's instruction dwells on the control aspect of agency but neglects the equally essential requirement that an agent have power to alter the relationship between its principal and third parties. 3 Am. Jur. 2d, Agency §2 (1962).

(f). The incorrectness of the entire invasion of privacy charge (444-449a) as a matter of law, has been previously discussed (Point III, *supra*). The trial court characterizes the Book as saying that Hemingway "tolerated [Hotchner] only for business purposes," (448a). Nowhere in the Book does it say this. Also, as the court pointed out in an earlier hearing in the case, it is entirely possible that Hotchner could be both a trusted friend of Ernest Hemingway and a toady and hypocrite. The two are not mutually exclusive, because Castillo-Puche does not have to hold the same opinion of Hotchner that Hemingway did. Nevertheless, the court instructed the jury that it might find "false light" if it found that Castillo-Puche represented Hotchner as something other than what Hemingway thought he was (444a, 449a). This was incorrect and prejudicial.

In conclusion, these errors by the trial court standing alone would be sufficient to warrant the granting of a new trial. When considered collectively, it is obvious that Doubleday was severely prejudiced throughout the trial.

POINT V

Hotchner as a Matter of Law Failed to Establish Proof Sufficient to Permit an Award of Punitive Damages Either Under Constitutional Standards or Under Substantive New York Law

The award of punitive damages cannot be justified either under applicable standards of the Federal Constitution or the substantive law of New York. Even if this Court was to conclude that Hotchner had met the constitutional standards to support a judgment of compensatory damages, it does not follow that the $125,000 punitive damage award was, upon the evidence in this case, permissible. Doubleday recognizes that one panel of this Court, in *Buckley* v. *Littell, supra,* refused to abandon the position it had taken in *Goldwater* v. *Ginsburg*, 414 F.2d 324, 340-1, that punitive damages can be awarded to a plaintiff in a public figure libel action. Nonetheless, the panel in *Buckley*, while rejecting the notion that *Gertz* should be read as prohibiting punitive damages, did so with some reluctance and said:

> "It may be that *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 350, and its underlying concern lest punitive damages be used *"selectively to punish expressions of unpopular views"* especially with *"the wholly unpredictable amounts"* that can be awarded will ultimately lead the Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure. But to date, the Court has not so held, stating in *Gertz* v. *Robert Welch, Inc., supra,* only that punitive damages cannot constitutionally be awarded to a plaintiff who has met a standard of proof less demanding than "actual malice". We recognize that this is a somewhat higher standard of proof than that enunciated by Mr. Justice Harlan for the plurality in *Curtis Publishing Co.* v. *Butts, supra,* and it may be that *Gertz* rejects the assertion in *Butts* that "punitive damages

> serve a wholly legitimate purpose in the protection of individual reputation." 388 U.S. at 161. But absent clear word from the Court to the contrary, or an *en banc*, we are bound to abide by our own controlling decision in *Goldwater, supra,* and therefore must permit such an award in the appropriate case." 539 F.2d 882, 897 (emphasis added).

The punitive damage award in this case is a clear manifestation that this Court's concern in *Buckley* that punitive damages do not serve a legitimate purpose and are awarded in wholly unpredictable amounts was well-founded. How else may the jury verdict be evaluated except that it was the result of prejudice flowing from the admission of the Purczinski translation and evidence concerning innocuous alleged inaccuracies not related to Hotchner, and the rejection of the constitutional standards that such a verdict be supported by proof of knowledge of falsity or such recklessness as to indicate a malicious intention to injure *Hotchner*. It is of some significance, we submit, that other courts have construed *Gertz* to prohibit an award of punitive damages to public figures. *Maheu* v. *Hughes Tool Company*, 384 F. Supp. 166 (C.D. Cal. 1974); *Stone* v. *Essex County Newspapers, Inc.*, —— Mass. ——, 330 N.E. 2d 161 (1975). If *Gertz* is read to permit an award of punitive damages on precisely the same proof as supports a verdict of compensatory damages, the danger is readily apparent that juries are apt to find in public figure cases that punitive damages must always accompany an award of compensatory damages. Here it is conceded that Hotchner failed to prove, indeed found it impossible to prove, that Doubleday published with knowledge of falsity; the jury's verdict of reckless publication rests upon its determination that Doubleday's editing of the offensive passages to eliminate, modify or tone down the same was insufficient in the circumstances and that there was some higher duty of investigation prior to publication. We submit that on the

facts of this case, the jury rejected the constitutional standards with respect to the award of punitive damages as laid down in *Gertz*.

Gertz, in commenting upon the federal standards which a public figure must meet if he is to be awarded punitive damages, recognized that the states were free to set or retain their own higher standards. According to *Gertz*, the states' standards were not to be affected by the requirements of *Gertz* unless state law permits the imposition of liability without fault, in which event the states were required to apply the federal minimum standard of publication with knowledge of falsity or with reckless disregard for the truth. (See, *Chapadeau* v. *Utica Observer-Dispatch*, *supra*).

The punitive damage award in this case cannot stand under New York law. In New York in libel actions an award of punitive damages is limited to occasions where the publication is made with a desire to harm the plaintiff or so recklessly made that its carelessness indicates a heedless disregard for the rights of plaintiff. *Clevenger* v. *Baker Voorhis & Co.*, *supra*.

In an earlier leading case, *Krug* v. *Pitass*, 162 N.Y. 154, 56 N.E. 526 (1900), the Court of Appeals had held:

> "In order to recover punitive damages, also, it was necessary for him [plaintiff] to furnish evidence of express malice. . . . Express malice consists in such publication from ill-will, or some wrongful motive, implying a willingness or intent to injure, in addition to the intent to do the unlawful act." (162 N.Y. at 160, 56 N.E. at 528).
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> * * *
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> "Punitive damages, which are in excess of the actual loss, are allowed where the wrong is aggravated by evil motives. . . ." (162 N.Y. at 161, 56 N.E. at 528).

In *Clevenger, supra*, cited by the district court in *Buckley* v. *Littell*, the Court of Appeals unanimously affirmed a decision striking entirely an award of $20,000 in punitive damages. In *Clevenger*, the Appellate Division noted that there was no claim that defendant was activated by a desire to harm plaintiff. Rejecting the contention that the proof showed a heedless disregard (recklessness) for the rights of others it held:

> [reckless disregard] is sought to be established by the presence of two facts: that the published volume contained numerous errors, many of which had been called to defendants' attention and, secondly, that the title page failed to indicate that plaintiff had ceased to be the editor. Most of the 'numerous errors' were virtually miniscule in character, and their chief impact would be on the sensitivities of an accomplished proofreader. When the presence of errors was called to defendants' attention, it was done in another connection, and the failure to make corrections is no indication of a reckless disregard of plaintiff's reputation. Actually, the defendants' own reputation was also at stake, and it is impossible to conclude that defendants were playing fast and loose with that. As for the title page, greater care would have disclosed the omission, but the editorial lapse involved is not a showing of heedlessness. No basis for the necessary findings to establish a claim for punitive damages is in the record." 19 App. Div. 2d at 340-341, 243 N.Y.S. 2d at 233.

Not only is there no basis in this record to support a claim for punitive damages, but the jury was permitted to consider evidence which should not have been admitted with respect to this issue, such as the alleged inaccuracies in the Book which are wholly unrelated to Hotchner, i.e., whether Hemingway like to make phone calls, or was naked or just barechested when he dove in a river.

The cases relied upon by Hotchner below to support an award of punitive damages are readily distinguishable. In *Reynolds* v. *Pegler*, 123 F.Supp. 36 (S.D.N.Y. 1954), *aff'd* 223 F.2d 429 (2nd Cir. 1955), Judge Weinfeld described punitive damages as "expressive of the community attitude toward one who wilfully and wantonly causes hurt or injury to another", and that they "are intended as punishment for *gross misbehavior* for the *good of the public*", *Id.* at 38 (emphasis added). He further stated that there was "abundant evidence upon which a jury could find actual malice . . . and reckless and wanton indifference" and that "counsel for the defendants . . . freely conceded as much". *Id.* at 40. Finally, the court held that there was repeated conduct after the original publication sufficient to support a finding that there existed "a calculated design to injure the plaintiff in his profession and in his standing in the community", *Id.* at 41. *Faulk* v. *Aware*, 19 App. Div. 2d 464, 244 N.Y.S. 2d 259 (1st Dep't 1963), *aff'd* 14 N.Y. 2d 899, 252 N.Y.S. 2d 95, 200 N.E. 2d 778 (1964), *cert. denied*, 380 U.S. 916 (1965), involved "a vicious libel deliberately and maliciously planned and executed with devastating effect upon the plaintiff all without semblance of justification", 19 App. Div. 2d 464, 468, 244 N.Y.S. 259, 262. In its discussion as to when punitive damages are permissible, the Appellate Division in *Faulk* quoted *Walker* v. *Sheldon*, 10 N.Y. 2d 401, 223 N.Y.S. 2d 488, 179 N.E. 2d 497 (1961) as holding: "Where the wrong complained of is morally culpable, or is actuated by evil or reprehensible motives", punitive damages are allowable. (19 App. Div. 2d at 471, 244 N.Y.S. 2d at 265). This court in *Goldwater* v. *Ginsburg*, *supra*, sustained an award of punitive damages only after it found:

> "As can be seen, appellee and the district judge did not rely on a few isolated instances of derogatory statements which could be charitably thought of as being non-actionable, negligent or good faith misstatements of fact, *but rather upon the totality of appellants'*

> *conduct as evidenced by the proffered materials from which a jury might reasonably find a predetermined and preconceived plan to malign the Senator's character.* Id. at 337 (emphasis added).

The evidence in this case, even upon the broadest reading, cannot support a finding that Doubleday set out with "a predetermined and preconceived plan to malign" Hotchner. Quite inconsistently, in view of its submission of the issue to the jury, the trial court recognized that there was absolutely no evidence of common law malice, ill will, intent to harm, or heedless disregard of the rights of others, stating:

> "There is no evidence of actual malice [meaning common law malice], as a layman would use that term on the part of Doubleday. Quite the contrary, Mrs. Medina was anxious not to, in her words 'get at Hotchner'. So if you use those words with regard to this defendant in a layman's sense it would be totally unfounded" (406a).

That there was no moral culpability or evil motive or any heedless disregard for the rights of Hotchner is proven by the care that Doubleday took in editing the manuscript and by the testimony of its employees, who were charged with the production and publication of the Book, that they had no intention of injuring Hotchner, but rather were activated by motives of avoiding any defamation of him. Their desire to avoid any injury to Hotchner is emphasized by their determination to stand upon their own editing of the manuscript despite Castillo-Puche's reaffirmation that his comments about Hotchner were true.

This total lack of common law malice on the part of Doubleday precludes an award of punitive damages under New York substantive law and, therefore, should be vacated.

POINT VI

The Amount of Punitive Damages Is Excessive

The *amount* of punitive damages awarded by the jury—$125,000 concurrently on each count—is excessive, particularly in relation to the compensatory damages awarded ($1), the nature of the defamation and the fact that Doubleday sold only 3,453 copies of the Book, losing money on the publication.

The Supreme Court recently recognized with obvious disfavor the dangers of unfettered punitive damage awards in First Amendment cases when it stated that: "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship"; that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused", and that punitive damages are "wholly irrelevant to the state interest", *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Ten years ago in a libel action the Supreme Court stated, "If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial", *Linn* v. *Plant Guard Workers of America, Local 114*, 383 U.S. 53, 65-66 (1966). This Court in *Buckley* v. *Littell, supra* recently recognized the necessity of reducing an award of punitive damages. An excessive punitive damage award serves as a "chilling restraint", and "the protection of an individual reputation" should not "carry overhanging punitive prospects excessively restrictive of freedom of press and comment," *Afro-American Publishing Co.* v. *Jaffe*, 366 F.2d 649, 662, 663 (D.C. Cir. 1966).

Because of the danger and injustice of large punitive awards in this area, there are many precedents of courts having granted new trials or required successful plaintiffs to agree to a reduction in the award. In *Casale* v. *Dooner Laboratories, Inc.*, 343 F. Supp. 917 (D. Md. 1972), the

trial judge found an award of $60,000 punitive damages (in addition to $8,000 compensatory) to be excessive and reduced it to $30,000, finding that "the degree of malice, wantonness and/or reckless disregard established in this case was not so great as to justify the size of the punitive damage awards rendered by the jury", *Id.* at 919. The size of any punitive damage award, the court noted, should be related to the degree of malice or wanton conduct proven, *Id.* at n. 2,* p. 919.

New York courts have consistently agreed. In *Faulk* v. *Aware, Inc., supra,* which involved deliberate, vicious and devastating libel that bears no relation to Doubleday's conduct vis-á-vis Hotchner, the Appellate Division reduced a punitive damage award by 94% and stated:

> "It is the duty of the court to keep a verdict for punitive damages within reasonable bounds considering the purpose to be achieved as well as the *mala fides* of the defendant in the particular case," (19 App. Div. 2d at 472, 244 N.Y.S.2d at 266).

In *Carter* v. *Johnson Publishing Co.*, 19 App. Div. 2d 800, 243 N.Y.S. 2d 46 (1st Dep't. 1963), the trial judge had reduced a jury award of punitive damages from $30,000 to $12,500, but the Appellate Division found this amount still excessive and reduced it to $5,000. In *Toomey* v. *Farley*, 2 N.Y. 2d 71, 156 N.Y.S. 2d 840, 138 N.E. 2d 221 (1956), cited by Hotchner below, the Court of Appeals affirmed the reduction of a punitive damage award by the Appellate Division from $7,500 to $5,000. For other examples of punitive award reduction in New York libel cases, see *Foerster* v. *Ridder*, 57 N.Y.S. 2d 668 (Sup. Ct N.Y. Co. 1945); *Kern* v. *News Syndicate Co.*, 20 App. Div. 2d 528, 244 N.Y.S. 2d 665 (1st Dep't 1963); and *Maybruck* v. *Haim*, 40 App. Div. 2d 378, 340 N.Y.S. 2d 469 (1st Dep't 1973).

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* On appeal, the libel count, including the reduced punitive damage award, was thrown out entirely, 503 F. 2d 303 (4th. Cir. 1973).

Further, this Court in *Buckley* did not hesitate to reduce the district court's award of punitive damages from $7,500 to $1,000 and even the reduced award is the subject of a petition to the Supreme Court for a writ of certiorari. It is particularly relevant that in *Buckley* this Court based the reduction on the fact that, (1) like Hotchner, plaintiff Buckley's reputation had not suffered (2) only a limited number of copies of the book had been sold (many more than in this case, where only 3,453 copies of the book were sold) and (3) defendant had only received $500 from the book (in this case Doubleday lost money on the Book).

In justifying the award of punitive damages, the district court ignored a comparison of the circumstances surrounding the publications in the instant case and the publications in the cases in which punitive damages have been upheld in libel actions. At the very least, there was no evidence in this action of a "predetermined or preconceived" plan, to malign Hotchner (see *Goldwater, supra*), a protracted attack against Hotchner, personal animosity or ill will by Doubleday towards Hotchner, or a design to oppress and injure Hotchner. (See, *Curtis Publishing Co.* v. *Butts, supra; Reynolds* v. *Pegler, supra; Goldwater* v. *Ginsburg, supra; Buckley* v. *Littell, supra*). Likewise, the court ignored a comparison of a severity of the libelous statements in those cases and the statements made about Hotchner in the Book.

Instead of carefully studying the above cited precedents, examining the facts proved at trial and then applying to the law of New York these facts, the trial court, in its opinion denying Doubleday judgment n.o.v. (176a), stated reasons for sustaining the $125,000 punitive damages award that are without precedent in New York. Apparently recognizing that Hotchner, as the jury found, suffered virtually no damage to his reputation and lost not one penny as a result of the publication of the Book, the trial judge nevertheless attempted to substantiate the allegation that Hotchner's reputation was "tarnished somewhat", on the

basis that a college student in Pittsburgh called in to a radio talk show on which Hotchner was promoting his Doris Day book and challenged Hotchner's relationship with Hemingway by referring to the Book (180a). If this one incident, the only incident which Hotchner could come up with, and the court's reasoning with respect to it, justify a *punitive* damages award of $125,000, the First Amendment has been rendered a nullity.

In this regard, while on the one hand the trial court exaulted the sanctity of the jury finding relating to reckless disregard of the truth, it rejected the jury verdict with respect to the finding of only $1.00 compensatory damages suffered by Hotchner. In its opinion denying Doubleday judgment n.o.v., the trial court states:

> "In weighing whether punitive damages are excessive, we may also consider that the compensatory damages are inadequate. Undoubtedly our jury intended the punitive award to do double duty and to solve his [Hotchner's] humuliated amour-propre." (180a)

The district court cites no authority for the proposition that plaintiff's "humiliated amour-propre" can be considered in justifying an award of punitive damages. In New York, as the trial court so charged (451a-453a), this is the function of compensatory damages, which were awarded in the amount of $1.00. Punitive damages are solely to deter and punish. This was the explicit instruction of the court in its charge to the jury (453a-454a). In short, there is not an iota of authority which would permit punitive damages to serve "double duty" under New York substantive law, especially when it is contrary to the court's own instructions on this specific point. Indeed, this reasoning ignores the relevance and importance of the trial court's instruction to its jury.

Similarly, the court's reference to the attorneys fees incurred by Hotchner in prosecuting the action as a justifi-

cation for the amount of punitive damages is without precedent in New York and against the weight of authority. (See e.g. *Day* v. *Woodworth*, 13 How. 363 (1851); *Oelrich* v. *Baine*, 15 Wall 211 (1872); *Viner* v. *Untrecht*, 26 Cal. 2d 261, 158 P.2d 3 (1945); *Barl* v. *Tupper*, 45 Vi. 275 (1873); *Hoadley* v. *Watson*, 45 Vt. 289 (1873); *Burbanks* v. *Witter*, 18 Wis. 287 (1864). Thus, in *Howell* v. *Scoggins*, 48 Cal. 355 (1874) and *Kinane* v. *Fay*, 111 N.J.L. 553, 168 A. 724 (1943), the court refused to instruct a jury that plaintiff's attorneys fees could be considered in awarding punitive damages, and in *International Electronics Co.* v. *NST Metal Products Co.*, 370 Pa. 213, 88 A. 2d 40 (1952) the court refused to permit plaintiff to introduce, as part of his evidence for the jury to consider in determining the amount of punitive damages, evidence of his attorneys fees in prosecuting the action.

Moreover, in the instant action, Hotchner did not offer any evidence concerning his attorneys fees and made no claim that they should be considered in the award of punitive damages, until he submitted his memorandum in opposition to Doubleday's motion for judgment n.o.v. Thus, aside from the fact that New York law does not provide for such consideration, there was no evidence before the jury with respect to his attorneys fees, and such evidence could not, therefore, have formed a basis for the jury's award.

It is true that in the minority of jurisdictions a plaintiff's attorneys' fees, or the fact that the compensatory damages might have been inadequate, can be considered by a court in passing on the reasonableness of the amount of punitive damages. This, however, is clearly not the law in New York. It has long been recognized by federal courts that it is not within their province or duty to interfere with or change a state's substantive law when that law does not interfere with a constitutional right. As stated in *Jarvik* v. *Magic Mountain Corporation*, 290 F. Supp. 998 at 999 (S.D.N.Y. 1968):

> "I agree with the criticism of the *Seider* rule . . . To my mind the rule is unsound in theory and unfair in operation. *It is, however, the law of New York and in this diversity case it is the duty of this court to apply the New York law unless it is unconstitutional*". (emphasis added)

Indeed, as this Court has held, the function of a federal court in applying state law is to ascertain the state law and apply it and not to speculate about what it may be in the future or to apply a rule it thinks better or wiser. *Hausman* v. *Buckley*, 299 F.2d 696 (2nd Cir. 1962), *cert. denied* 369 U.S. 885 (1962). Thus, any attempt to cite the minority authority of other jurisdictions in support of these considerations is unwarranted, especially since they have been rejected in New York.

By the same token, justification of the punitive damage award on the grounds that the award is taxable to plaintiff (181a) is equally misplaced. The tax consequences of damages are not part of the Record, were never charged to the jury, and therefore taxes cannot properly be used as a justification for the jury's punitive damage award.

Also, there is authority in New York that punitive damages should bear some relationship to the injury inflicted in the cause thereof, although the trial court instructed to the contrary* (454a). Thus, in *Kern* v. *News Syndicate*

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* Indeed, the district court also attempted to justify the $125,000 award on the basis of the wealth of Doubleday. Again not an iota of evidence was introduced as to Doubleday's alleged "wealth" and for all the jury or the district court may know Doubleday could be losing millions of dollars per year. In any event, in this State there is authority that evidence of the financial condition of a defendant is not admissible for the purpose of assisting the jury in measuring punitive damages. (See, e.g. *Stewart* v. *Mutual Clothing Co.*, 195 Misc. 244, 91 N.Y.S. 2d 338 (Co. Ct., Mon. Co. 1949). In support of this view, the Court in *Wilson* v. *Onondaga Radio Broadcasting Corp.*, 175 Misc. 389, 23 N.Y.S. 2d 654 (Sup. Ct., Onon. Co. 1940) states as follows: "to measure punitive or

Co., supra, the Second Department held that where a jury in a libel suit awarded plaintiff only $1,000 as compensatory damages, the smallness of that award merited a reduction in the punitive damages. (See also, *De Marse* v. *Wolf*, 140 N.Y.S. 2d 235 (Sup. Ct. Qns. Co. 1955)). Indeed, in light of the previously quoted language of the Supreme Court in *Gertz* indicating grave concern that punitive damages may often be in "wholly unpredictable amounts", the rule that there should be a reasonable relationship should be rigidly observed at least in First Amendment libel actions. In this regard, in the three Federal Court of Appeals' decisions which have permitted awards of punitive damages since *Gertz*, the amounts have been at levels modest in comparison on the compensatory damages awarded: *Buckley* v. *Littell*, *supra* $1.00 compensatory and $1,000 punitive; *Davis* v. *Schuchat*, 510 F.2d 731 (D.C. Cir. 1975), $1.00 compensatory and $1,500 punitive; *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976) $10,000 compensatory and $5,000 punitive. When punitive damages do not bear a reasonable relationship to the harm inflicted, it necessarily results in an unconstitutional prohibition on the exercise of free speech. See, *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971) at 74-75, dissent of Mr. Justice Harlan; *Appleyard* v. *Transamerican Press, Inc.*, *supra*, at 1030.

In conclusion, the award of $125,000 punitive damages in this action is outrageous and at the very least requires a substantial reduction in amount. If this award is permitted to stand on the basis of the evidence which was presented a trial, the detrimental effect it will have on freedom of the press and First Amendment rights is both oppressive and frightening. Further, the district court's purported justifications for upholding the award in the amount of

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exemplary damages by the wealth of defendant it seems far fetched, as well might the State impose a fine in a criminal case in accordance with the defendant's ability to pay".

$125,000 are without basis in New York substantive law. In short, the punitive damage verdict in this case is without precedent and totally unjustified and if it is permitted to stand it will impose a chilling restraint on the values as found in the First Amendment and on this society's concept of freedom of expression.

CONCLUSION

For All the Foregoing Reasons, as a Matter of Law the Jury Verdict and Judgment Should Be Reversed and Judgment Should Be Entered in Favor of Doubleday Dismissing Hotchner's Complaint.

Respectfully submitted,

SATTERLEE & STEPHENS
Attorneys for Defendant-Appellant
Doubleday & Company, Inc.
277 Park Avenue
New York, New York 10017
(212) 826-6200

JAMES F. DWYER
ROBERT M. CALLAGY
JAMES F. RITTINGER
Of Counsel

Service of a ... within

deal ... is admitted this

6 day of December 1976.

Steven Brannon

ATTORNEY FOR

David Coppelle